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Service Employees International Union Local 1877, Division 87[1] (American Building Maintenance, Metro Maintenance, One Source Building Services) *and* Hugo Brolyn *and* Mumar Abdo Alhanshali *and* Manuel Juarez. Cases 20–CB–11894, 20–CB–11973, and 20–CB–12018

August 25, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 8, 2004, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Service Employees International Union Local 1877, Division 87, AFL–CIO, San Francisco, California, its officers, agents, and representatives, shall take the action set forth in the Order.

Dated, Washington, D.C. August 25, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jill H. Coffman, Esq. and *Robert Guerra, Esq.*, for the General Counsel.

Stewart Weinberg, Esq. (Weinberg, Roger & Rosenfeld), of Oakland, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this consolidated case in trial at San Francisco, California, on September 14, 15, and 29, 2004. On March 7, 2003, Hugo Brolyn filed the charge in Case 20–CB–11894–1 alleging that SEIU Local 1877, herein described by its correct name, Service Employees International Union Local 1877, Division 87, AFL–CIO (Respondent or the Union) committed certain violations of Section 8(b)(1)(A) of the National Labor Relations Act (the Act). On May 21, 2003, Brolyn filed an amended charge against the Union alleging violations of Section 8(b)(1)(A) and (2) of the Act. On June 16, 2003, Mumar Abdo Alhanshali

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We reject the General Counsel's exception to the judge's failure to find that Business Agent Oscar Romero interrogated employee Manuel Juarez. We find that the judge implicitly discredited Juarez as to this allegation. We rely on the fact that the judge specifically discredited Juarez' testimony that Romero threatened him and, contrary to our dissenting colleague's implication, the General Counsel did not except to that dismissal or to the credibility resolution upon which it was based. We also do not agree with our colleague that the judge resolved credibility against Juarez on that issue solely because his testimony was not corroborated. The judge also relied on the strength of Romero's denial. He described Romero as "emphatically den[ying] making any such statement." See also fn. 1 of ALJD. In addition, Juarez testified that the alleged interrogation and another conversation between him and Romero took place on different days. This testimony contradicted a sworn statement Juarez made previously further supporting the discrediting of his testimony both as to the threat and the interrogation. Member Liebman agrees with the judge that the evidence is insufficient to support a finding that the Respondent Union, by its Business Agent Oscar Romero, threatened to refuse to dispatch from its hiring hall anyone signing a petition to decertify it. In doing so, however, she would not accept the judge's discrediting the testimony of union member Manuel Juarez regarding this incident merely because his testimony was not corroborated by other persons present during the alleged incident. There is no requirement that testimony must be corroborated to be credible. *Marchese Metal Industries*, 302 NLRB 565, 570 (1991); *Purolator Products*, 270 NLRB 694, 719 fn. 44 (1984), enf. 121 L.R.R.M. (BNA) 2120 (4th Cir. 1985) (unpublished). In dismissing the allegation, she would instead find that the evidence regarding the threat was in equipoise and thus the General Counsel did not carry his burden of persuasion. *Promedica Health Systems, Inc*., 343 NLRB No. 131, slip op. at 28 (2004). She therefore would not find that the judge implicitly discredited Juarez' testimony that Romero interrogated employees regarding the decertification petition. In any event, the Board has long held that a fact-finder's failure to credit part of a witness' testimony does not preclude crediting other parts of his testimony. *TNT Skypak, Inc.*, 312 NLRB 1009 fn. 1 (1993), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). Because the judge did not address Juarez' testimony regarding the interrogation (*including the possible basis for discrediting now raised by my colleagues*), Member Liebman would remand this issue.

filed the charge in Case 20–CB–11973–1 against Respondent. Manuel Juarez filed the charge against Respondent in Case 20–CB–12018–1 on August 20, 2003. Alhanshali filed an amended charge in Case 20–CB–11973–1 on October 8, 2003. On June 26, 2003, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, in Case 20–CB–11894–1, alleging that the Union violated Section 8(b)(1)(A) and (2) of the Act. Thereafter on September 30, 2003, a complaint was issued in Case 20–CB–11973–1 against Respondent and on October 17, 2003, a complaint was issued in Case 20–CB–12018–1. On August 30, 2004, an amended consolidated complaint was issued in all three cases. Respondent filed timely answers to the complaints, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following[1]

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent admits and I find that at all times material herein Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

The consolidated complaint alleges jurisdiction based on the operations of certain employers who utilize the Union's exclusive hiring hall. Respondent (and its predecessor) and the San Francisco Maintenance Contractors Association (the Association) have been parties to successive collective-bargaining agreements, the most recent of which was effective by its terms from August 1, 1999, to July 31, 2003. One Source Building Services, Inc. (One Source) has been party to the 1999–2003 Association-Respondent collective-bargaining agreement. American Building Maintenance Company (ABM) has also been party to the 1999–2003 Association-Respondent collective-bargaining agreement. At all times material, Respondent and Metro Maintenance, Inc. (Metro) have been party to a collective-bargaining agreement whereby the parties agreed to be bound by the terms and conditions of the 1999–2003 Association-Respondent collective-bargaining agreement.

Metro is a corporation with a principal place of business in San Francisco, California, where it is engaged in the business of providing cleaning services to commercial clients. During the 12 months prior to the issuance of the complaint, Metro provided services in excess of $50,000 to customers who met the Board's standards for the assertion of jurisdiction on a direct basis.

One Source is a corporation with a principal place of business in San Francisco, California, where it is engaged in the business of providing cleaning services to commercial clients. During the 12 months prior to the issuance of the complaint, One Source provided services in excess of $50,000 to customers who met the Board's standards for the assertion of jurisdiction on a direct basis.

ABM is a corporation with a principal place of business in San Francisco, California, where it is engaged in the business of providing cleaning services to commercial clients. During the 12 months prior to the issuance of the complaint, ABM provided services in excess of $50,000 to customers who met the Board's standards for the assertion of jurisdiction on a direct basis. Accordingly, I find that Metro, One Source, and ABM meet the Board's jurisdictional standards for asserting jurisdiction over nonretail enterprises.

II. ISSUES

1. Did Respondent violate Section 8(b)(1)(A), through Oscar Romero, business representative, by threatening employees with loss of work because they signed a decertification petition?

2. Did Respondent through Romero violate Section 8(b)(1)(A) by interrogating employees about whether they had signed a petition to decertify the Union?

3. Did Respondent violate Section 8(b)(1)(A) and (2) by causing One Source to terminate the employment of Mumar Abdo Alhanshali on or about May 6, 2003 and June 10, 2003?

4. Did Respondent violate Section 8(b)(1)(A) and (2) of the Act by causing Metro to terminate the employment of Hugo Brolyn on or about April 10, 2003?

5. Did Respondent violate Section 8(b)(1)(A) of the Act through Romero by telling Brolyn that Respondent would not assist him or refer him for work because he had filed charges with the Board?

6. Did Respondent violate Section 8(b)(1)(A) and (2) by failing and refusing to refer Brolyn for work through its exclusive hiring hall?

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

As stated above, Respondent has collective-bargaining agreements with Metro, One Source, ABM, and the Association. These collective-bargaining agreements provide for an exclusive hiring hall arrangement. At issue herein is the hiring of temporary employees to perform janitorial work.

Pursuant to the collective-bargaining agreements, temporary positions are vacancies created when a permanent employee calls in sick, goes on vacation, or is out on disability. The employee who is referred and then hired for the temporary position only works for the employer as long as the temporary vacancy exists, subject to the limitations set forth in the collective-bargaining agreement. In contrast, a permanent position refers to an employer's regular crew of employees, who are regularly scheduled to work for as long as the employer does not need to lay off workers due to a lack of work. According to the collective-bargaining agreements, an employer is required

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings therein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

to keep a list of laid-off permanent employees and a list of nonpermanent employees.

The agreements provide:

> Each employer shall supply the Union with a copy of the permanent and non-permanent list that it prepares pursuant to this provision. Thereafter, each employer shall supply the Union with a daily report concerning the filling of temporary vacancies no later than 3:00 p.m. following the completion of the previous workday. . . . (There shall be no exception to the 3:00 p.m. requirement unless there are extenuating circumstances such as phone line being down, in that case the employer is required to supply the daily report as soon as possible.) This report shall contain the following information: employees name, name and address of new hires, current assignment, if any, date of assignment, if any, employee being replaced, reasons for open position, estimated duration.

The agreements further provide:

> When filling any temporary vacancy, each employer shall fill the vacancy by first selecting from its non-permanent list. The order of selection shall be based on the ranking on the non-permanent list. On any given day, the employer shall select for any temporary vacancy the highest ranking qualified employee on its list who is not working that date. An employee selected to fill a temporary vacancy will continue on that assignment until the permanent employee who is being replaced returns to work. However, if the employee filling a temporary vacancy is making less than the top wage rate, and if the temporary vacancy which that employee is filling lasts more than six weeks, then after that employee has worked six weeks filling that vacancy, the employer agrees to replace that employee with the most senior qualified top wage rate employee on its non-permanent list. If at that time the employer does not have a qualified top wage rate employee available on its non-permanent list, then the employee in that temporary vacancy may continue to fill it. At the conclusion of any assignment, the employee will again be eligible to fill other temporary vacancies based on that employee's ranking on the non-permanent list.

In practice, employees seeking referral to temporary positions are separated into three lists: permanent employees on layoff; temporary employees at the top wage rate, and temporary employees not yet at the top rate. When filling a temporary position an employer first utilizes its list of laid-off permanent employees. If an employer cannot fill a temporary position from its list of laid-off employees, the employer calls the Union for a dispatch according to the preferences outlined above.

According to the agreements, an employee filing a temporary position will continue in that position until the permanent employee returns or the position is eliminated. As stated above, the agreements also provide that "after [a temporary] employee has worked six weeks filing that vacancy, the employer agrees to replace that employee with the most senior qualified wage rate employee on its non-permanent list." However, if no qualified top wage rate employee is available, the employer may continue to employ the temporary employee in the same position. Thus, General Counsel contends that once an employee has been properly referred to a temporary position, the employee may not be removed from the job by the Union unless: (a) 6 weeks have passed; (b) the temporary employee is making less than top wage rate; and (c) there is a qualified top wage rate employee available at that time.

Counsel for the General Counsel moved to admit two affidavits of Hugo Brolyn into evidence under Rule 807 of the Federal Rules of Evidence.[2] Brolyn submitted two affidavits to the General Counsel dated April 8, 2003 and June 4, 2003. The General Counsel asserted that Brolyn was deceased and produced a copy of a purported death certificate from Guatemala showing that Brolyn died in September 2003. However, the purported death certificate was not authenticated. Nonetheless, the record shows that General Counsel attempted to locate Brolyn and was told by his relatives that he was deceased. Accordingly, I found that the General Counsel met his obligations under the rule, including notice to the Respondent concerning the problem of obtaining Brolyn's testimony and serving a copy of the affidavits on the Respondent. *Justak Bros. & Co.*, 253 NLRB 1054, 1080–1081 (1981), enfd. 664 F.2d 1074 (7th Cir. 1981). I found that Brolyn was "unavailable" under the terms of Rule 807 and that his affidavits have evidentiary value. See also *New Life Bakery*, 301 NLRB 421, 426 (1991).

An agent of the Board authenticated Brolyn's first affidavit. An English-speaking Board agent took the statement with a bilingual interpreter. A statement was produced in English, which was then translated into Spanish. Brolyn read the Spanish affidavit, swore to its truth and signed it in the presence of the two Board agents. However, the second affidavit was not signed in the presence of the Board agents. On that occasion, the same process was followed except that Brolyn left the Board's offices before the English affidavit was translated into Spanish. The Spanish language affidavit was mailed to Brolyn with a cover letter written in Spanish. The affidavit was signed and returned to the Board's office by regular mail. The General Counsel offered the testimony of Susan E. Morton, a forensic document examiner, who compared the signature on the questioned affidavit with known samplers of Brolyn's signature. Morton testified that the signature on the questioned document was probably that of Hugo Brolyn. Based on Morton's testimony, I accept the affidavit as authentic.

Brolyn filed the charge in Case 20–CB–11894 on March 7, 2003, alleging that Respondent had unlawfully removed him from employment. Thus, when Brolyn gave his affidavit on

[2] "A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

April 8, 2003, he knew or should have known that a successful case would result in reinstatement and/or backpay. Brolyn stated that after he obtained a dispatch from the Union's hiring hall in May 2002, he was asked by a supervisor from Capital Building Service (CBS) to work at a building located at 1155 Battery Street in San Francisco. Brolyn admitted that he did not have a dispatch for this position. However, Brolyn accepted the job from CBS at 1155 Battery Street. Brolyn stated that his job was a utility position (waxing and stripping floors, cleaning floors and shampooing carpets).

On or about January 1, 2003, CBS sold its contract to Perform Janitorial Services at certain buildings, including 1155 Battery Street to Metro. CBS terminated all the employees at 1115 Battery Street but those employees, including Brolyn, were immediately hired by Metro. On or about February 2, Brolyn was told that he did not have a proper dispatch and that he should go to the union hall to obtain a dispatch. According to Brolyn, Louie Rada, then the Union's coordinator for building services, told him to work at 1155 Battery Street and that Rada would give Brolyn a dispatch after Brolyn produced his social security number. However, when Brolyn returned the next day, Rada said that Brolyn did not have a proper dispatch and that the position at 1155 Battery had to go to a more senior employee.

Shortly thereafter, Brolyn was called back to work at 1155 Battery Street by a supervisor from Metro. Brolyn worked 1 night and then was sent back to the union hall because he did not have a dispatch. Brolyn received a dispatch to a different building to work for Metro. On March 31, Brolyn was again dispatched to 1155 Battery Street and worked 1 night. On April 1, Brolyn went to the hiring hall and spoke with Rada. Rada could not find out what the problem was and Brolyn worked at 1155 Battery for at least 3 more nights.

Thereafter, on May 21, 2003, Brolyn filed an amended charge alleging that the Union had told him to stop coming to the union hall to be dispatched because Brolyn had filed an unfair labor practice charge against the Union and that the Union had thereafter refused to dispatch Brolyn for employment through its hiring hall. In furtherance of this amended charge, Brolyn gave the questioned affidavit in June 2003. In his second affidavit Brolyn stated that he was first dispatched to CBS in March 2002 as a temporary employee. Brolyn applied for permanent employment with CBS in June 2002. According to Brolyn, Metro began giving him fringe benefits (as if he were a permanent employee) in February 2003.[3] However, Brolyn ceased working at 1155 Battery in early February 2003.

On March 31, 2003, Brolyn was again dispatched by the Union to Metro. On April 10, 2003, Brolyn was told to go back to the union hiring hall. According to Brolyn he signed the out-of-work list but did not receive a dispatch. Brolyn was at the union hiring hall every day between April 14 and April 18 but never received a work dispatch. During the week of April 21, according to Brolyn, Oscar Romero, organizer and dispatcher told him, "I can't assist you. The only thing that I can tell you, no matter how many times you come here, you will not get a dispatch. I will tell the others here not to give you a dispatch. I will see you at the Labor Commissioner."[4]

Brolyn returned that day but did not receive a dispatch. Brolyn did not return to the hiring hall again. Marvin Florence, general manager of Metro, testified that in the spring of 2003, Rada called him and said that Brolyn could not work at 1155 Battery because he had not been properly dispatched to the job.[5] Florence notified Supervisor Wayne Tsang that Brolyn had to be returned to the hiring hall. This testimony explains why Metro sent Brolyn back to the union hall on April 10. Rada, no longer employed by the Union, did not testify. There is no evidence to support the contention that Brolyn was not properly dispatched on March 31.

Oscar Romero, no longer employed by the Union, denied making the statements attributed to him by Brolyn. Romero testified that Brolyn had been removed from his temporary job at 1155 Battery Street and replaced by an employee with more seniority. Romero had nothing to do with this action and had no first-hand knowledge of Brolyn's job referral or removal. On cross-examination Romero admitted knowing that Brolyn had filed an unfair labor practice charge. Romero also admitted that he had been contacted by a Board agent seeking to investigate the charge shortly before the alleged conversation with Brolyn. Romero was not a credible witness. He was reluctant to testify and contradicted his own testimony on several occasions.[6] I do not credit Romero's testimony and will base my findings on Brolyn's affidavit.

Manual Juarez, a janitor and member of Respondent, testified that in March of 2003, petitions were being circulated to decertify the Union as representative of the janitors. According to Juarez, in April 2003, Romero told approximately 60 employees waiting in the hiring hall, that anyone who signed a petition to decertify the Union would not be dispatched, would not have work, and would not have benefits. According to Juarez, Romero then tore up pieces of paper purporting to be antiunion petitions. Although there were allegedly 60 employees present, the General Counsel presented no witness to corroborate this testimony. Romero emphatically denied making any such statement. Under these circumstances, I do not give any weight to Juarez's testimony and I reluctantly credit Romero's denial.

Mumar Abdo Alhanshali, a janitor and member of the Union, testified that he was dispatched as a temporary janitor to One Source on April 1, 2003, to a building at 345 Spear Street in San Francisco. Alhanshali worked at that location for approximately 1 month. In early May, he was told by Lynork

[3] It appears that when Metro hired Brolyn and the other former CBS employees, it mistakenly believed that Brolyn was a permanent employee of CBS (and presumably had been properly dispatched).

[4] Brolyn did not file a charge or complaint with the State Labor Commissioner. The General counsel contends that the reference to the Labor Commissioner must have been intended to refer to the Labor Board.

[5] Respondent contends that Brolyn had not been properly dispatched to Metro prior to Brolyn's April 10 discharge. However, Rada did not testify and there is no evidence to support that contention. Brolyn had been lawfully removed from the job in February. However, he later obtained union referrals to work for Metro.

[6] Romero testified that he refused to assist Brolyn but only because of Brolyn's behavior at the union hall. I do not credit this testimony.

"Jay" Jenks, his supervisor, to return to the union hall. Alhanshali spoke with Union Agent Elsa Elmanza[7] and was told that he did not have the "top rate." Alhanshali said he was earning the top rate and Elmanza then said that Alhanshali did not have a dispatch. Alhanshali said he would bring in his dispatch slip. Thereafter, Alhanshali returned with the dispatch slip. Elmanza then incorrectly claimed that Alhanshali did not have a proper dispatch to 345 Spear Street.

Two or 3 days later, Alhanshali spoke with Elmanza's supervisor, Louie Rada, and asked why the Union had removed him from the job at 345 Spear Street. Rada said that he would try and correct the situation. A few days later, Rada told Alhanshali that the position was given to a permanent employee who had preference under the contract. Alhanshali asked Rada to call One Source to see if the position was a temporary or permanent position. Rada then called Jenks at One Source. Jenks stated that the position was a temporary position due to the illness of a permanent employee.[8]

Alhanshali returned to work at 345 Spear Street on or about May 19. However, he was not dispatched by the Union. Rather, he returned based on a phone call from Jenks. The employee that replaced Alhanshali had quit and Jenks wanted Alhanshali to return to this temporary assignment. In early June, Elmanza found Alhanshali working at 345 Spear Street. She told Alhanshali that he could no longer work at the building. She told Alhanshali that the building was reducing its work force.

Jenks, operations manager for One Source, testified that on April 1, 2003, Alhanshali was dispatched to One Source and that he assigned Alhanshali to work at 345 Spear Street. Alhanshali was assigned as a temporary janitor to fill in for an employee on sick leave. Approximately a month after Alhanshali began this assignment, Elmanza said that Alhanshali had to be returned to the hiring hall because the Union had more senior employees out of work. Jenks pointed out that the Union had dispatched Alhanshali but Elmanza insisted that the janitor be returned to the hiring hall.[9] Jenks submitted to Elmanza's demand and told Alhanshali that he had to return to the union hall, on or about May 5.

The Union dispatched another employee to replace Alhanshali. However, that employee quit after a week. Jenks called Alhanshali that same day to return to the temporary position. Jenks testified that the hiring hall had not yet opened and, therefore, under the contract he could call Alhanshali without going through the hiring hall.[10] Alhanshali then worked for One Source for approximately 1 month. In early June 2003, Elmanza told Jenks that she wanted to replace Alhanshali with a more senior employee. Jenks complied with Elmanza's request and Alhanshali was again laid off. Again, the bargaining agreements do not permit the Union to "bump" temporary employees who have been properly dispatched and have worked for less than 6 weeks.

Respondent has not produced witnesses or documents to support its contentions that Brolyn and Alhanshali were not discriminated against. When a party has relevant evidence within his control, which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. An inference may even be warranted that the material, which the party refuses to show supports exactly the opposite of what he contends at the hearing. *National Football League*, 309 NLRB 78, 97–98 (1992). I draw an adverse inference against Respondent due to its failure to call any witness or present any documents to explain its contentions that Alhanshali and Brolyn had not been properly dispatched to the temporary positions at issue herein.

B. Analysis and Conclusions

Section 8(b)(1)(A) of the Act provides that it shall be an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of the Act." The proviso to Section 8(b)(1)(A) states that the Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." Section 8(b)(2) makes it an unfair labor practice for a union:

> To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

As the Board recently stated in *Electrical Workers Local 48 (Oregon-Columbia NECA)*, 342 NLRB No. 10, slip op. at 6–7 (2004):

> In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that a union breaches its duty of fair representation by conduct toward a member of the collective-bargaining unit that is "arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. Guided by subsequent Supreme Court decisions construing the duty of fair representation, the Board has held that the three-pronged *Vaca v. Sipes* standard applies to all union activity, including the operation of a hiring hall. *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999), enf. denied sub nom. *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000).
>
> When a union purposely departs from the rules governing the operation of its hiring hall, it dramatically displays its power to affect employees' livelihood. Such a deliberate departure constitutes arbitrary, discriminatory, or bad-faith conduct in violation of the duty of fair representation, and violates Section 8(b)(1)(A) and (2), unless the union can demonstrate that the departure was pursuant

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[7] Elmanza, no longer employed by the Union, did not testify.

[8] Respondent contends that Elmanza believed that Alhanshali was not properly dispatched. However, Elmanza did not testify and the record does not show that Alhanshali was not properly dispatched.

[9] The agreements do not permit the Union to use seniority to "bump" a temporary employee who had been previously dispatched properly and has worked for less than 6 weeks.

[10] The assignment that Jenks gave Alhanshali was unusual in that it had an earlier starting time than the usual janitorial jobs. The unusual starting time made the job undesirable for some employees. The starting time for the job began prior to opening of the Union's hiring hall. Thus, Jenks could not obtain an employee referral from the Union.

to a valid union-security clause or was necessary to the effective performance of its representative function. *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB at 550, enfd. sub nom. *Jacoby v. NLRB*, 325 F.3d 301 (D.C. Cir. 2003); *Operating Engineers Local 406 (Ford, Bacon & Davis Construction*), 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983).

[Footnotes omitted.]

As set forth above, on April 10, 2003, Respondent had Brolyn removed from a temporary position at a Metro site. Brolyn had been properly dispatched by the Union. There is no contention that this action was pursuant to the contract's union-security clause. Respondent has offered no evidence that this action was necessary to enforce the collective-bargaining agreement. Rather, the Union's conduct appears to be a departure from the bargaining agreement.[11] There is no evidence that the Union's actions were necessary to the effective performance of its representative function. Accordingly, I find that Respondent violated Section 8(b)(1)(A) and (2) in causing Metro to discriminate against Brolyn in violation of the Act.

Thereafter, Romero threatened Brolyn in violation of Section 8(b)(1(A) of the Act by telling Brolyn that the Union would not dispatch him for work. Brolyn was not dispatched thereafter. The Union provided no defense to the failure to dispatch Brolyn.[12] Accordingly, I find the Union has failed to rebut the prima facie case that its actions unlawfully violate its duty of fair representation. Thus, I find that Respondent failed and refused to permit Brolyn to use its hiring hall in violation of Section 8(b)(1)(A) and (2) of the Act.

In May 2003, Respondent, through Elmanza, requested that One Source replace Alhanshali with a more senior employee. Again in June, One Source, at the Union's request replaced Alhanshali with a more senior employee. Neither action was supported by the collective-bargaining agreement. It appears on both occasions the Union departed from the collective-bargaining agreement. The Union provided no defense to these actions. Accordingly, I find the Union has failed to rebut the prima facie case that its actions unlawfully violate its duty of fair representation. Thus, I find that Respondent caused One Source to discriminate against Alhanshali in violation of Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. American Building Maintenance, Metro Maintenance, and One Source Building Maintenance are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent, Service Employees International Union, Local 1877, Division 87, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(b)(1)(A) and (2) by causing One Source to discharge Mumar Abdo Alhanshali on or about May 6, and on or about June 10, 2003.

4. Respondent violated Section 8(b)(1)(A) and (2) by causing Metro Maintenance to discharge Hugo Brolyn on or about April 10, 2003.

5. Respondent violated Section 8(b)(1)(A) and (2) by failing and refusing to permit Brolyn to obtain work through its exclusive hiring hall beginning on or about April 14, 2003.

REMEDY

Having found that Respondent engaged in unfair labor practices, I recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Respondent shall be ordered to make whole Mumar Abdo Alhanshali and Hugo Brolyn for all earnings and other benefits lost as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent Service Employees International Union, Local 1877, Division 87, AFL–CIO, San Francisco, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Departing from the rules governing the operation of its hiring hall where such a departure is neither pursuant to a valid union-security clause nor necessary to the effective performance of its representative function.

(b) Refusing to permit an employee to use the Union's hiring hall because that employee filed charges under the Act.

(c) Threatening any employee with loss of employment or other discrimination because that employee filed charges under the Act.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Mumar Abdo Alhanshali and Hugo Brolyn for all earnings and other benefits lost as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[11] The Union contends that Brolyn had not been properly dispatched but there is no evidence to support that claim.

[12] When a party has relevant evidence within his control, which he fails to produce, that failure gives raise to an inference that the evidence is unfavorable to him. An inference may even be warranted that the material that the party refuses to show supports exactly the opposite of what he contends at the hearing. *National Football League*, 309 NLRB 78, 97–98 (1992). I draw an adverse inference against Respondent due to its failure to call any witness or present any documents to explain the failure to dispatch Brolyn after April 14, 2003.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, out-of-work lists, daily sign-in reports, daily dispatch reports, member master inquires, introduction slips, dues withholding authorizations, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its hiring hall, meeting rooms, and offices in San Francisco, California, copies of the attached notice marked Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 14 days after service by the Region, sign and return to the Regional Director for Region 20 sufficient copies of the notice for posting by the Employers, and if willing, at all places where notices to employees are customarily posted. Further, Respondent-Union shall duplicate and mail, at its own expense, a copy of the notice to employees and members, to all former bargaining unit employees employed by the Employers at any time since April 10, 2003, and to all current bargaining unit employees employed at any worksite at which the Employers are unable for any reason to post the notice to employees and members.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, San Francisco, California December 8, 2004

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT deliberately depart from the rules governing the operation of the hiring hall where such a departure is neither pursuant to a valid union-security clause nor necessary to the effective performance of our representative function.

WE WILL NOT refuse to allow employees to obtain employment through our hiring hall because those employees filed charges under the National Labor Relations Act.

WE WILL NOT threaten employees with loss of employment or other reprisals for filing charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights set forth above.

WE WILL make whole Hugo Brolyn and Mumar Abdo Alhanshali for any losses they may have suffered by reason of the discrimination against them, with interest.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1877, DIVISION 87 AFL–CIO

[14] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."